United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1585

United States Court of Appeals
FOR THE SECOND CIRCUIT

SCM CORPORATION,
Plaintiff-Appellant,

against

XEROX CORPORATION,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

REPLY BRIEF OF PLAINTIFF-APPELLANT SCM CORPORATION

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This brief contains information designated as confidential by Xerox Corporation and is filed under seal pursuant to the order entered herein by the United States District Court for the District of Connecticut on January 8, 1974.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Note Regarding Confidentiality

This brief contains descriptions of matters in the Record below that were designated as "Confidential" by Xerox. Thus, pursuant to the "Protective Order" respecting treatment of confidential documents entered by the district court at Xerox's suggestion on January 8, 1974, this brief is being filed under seal and bears a legend regarding confidentiality on the cover.

REPLY BRIEF OF PLAINTIFF-APPELLANT SCM CORPORATION

Our objective in this reply brief is to demonstrate that the principal and oft-repeated themes developed in Xerox's brief are wrongly constructed and, in any event, irrelevant to the issue of the legal sufficiency of SCM's motion for a preliminary injunction. We intend to show in response that:

1. SCM's motion was grounded not on conclusory allegations, but rather on highly specific allegations of irreparable injury further supported by documentary evidence, all of which Xerox ignores;

2. SCM never refused to furnish affidavits, indeed, the court below never requested them and affidavits would in any event serve no purpose other than further delay;

3. SCM requested in the proceedings below each of the forms of relief it discusses in its main brief;

4. Xerox recognizes that the decision of the district court cannot be supported as a matter of law when it now attempts to disavow the very Rule 12(b) (6) principles it invoked; and when it now attempts to uphold the decision below with factual arguments; and

5. SCM does not, as Xerox spuriously claims, seek an advisory opinion; but SCM seeks a judicial determination on the merits after evidentiary hearing of a genuine controversy concerning SCM's claimed entitlement to injunctive relief against Xerox during the pendency of the action.

This brief will also respond to Xerox's arguments concerning matters already treated in SCM's main brief, including: the inadequacy of money damages; the public's interest in enjoining Xerox's unlawful conduct; the maintenance of the *status quo;* the insufficient character of Xerox's representations concerning patents and restrictive employment agreements; and other matters. However, concerning SCM's principal arguments on this appeal, we rely on the main brief, much of which Xerox has made no attempt to rebut. SCM's main brief contains a de-

tailed discussion of the nature of Xerox's violations; their immediate unlawful effects on SCM and other plain paper office copier competitors; and the relief which would prevent and abate those continuing violations and unlawful injurious effects during the pendency of the action.

A. The Ultimate Issues of Irreparable Injury and Judicial Power to Grant Relief.

As to the questions of law presented on this appeal concerning possible irreparable injury during the pendency of the action to SCM as a plain paper office copier competitor of Xerox's, and the existence of judicial power to grant interim relief, we adhere as strongly as words can express to the view that the district court's determinations in these regards, and its ultimate determination denying SCM's motion as a matter of law without evidentiary hearing, constitute extraordinary error. This is so because the very premise of the court's decision and of Xerox's argument (Xerox Br. 7-8) is its concessions (Xerox Br. 16) for purposes of testing the legal sufficiency of SCM's motion, that at an evidentiary hearing SCM can establish a substantial likelihood of success on the merits and prove that:

1. SCM has been a struggling potential and actual competitor of Xerox's with respect to the technology, manufacture and marketing of plain paper office copiers;

2. Xerox is guilty, in violation of Section 2 of the Sherman Act, of massive monopolization of the technology, manufacture and marketing of plain paper office copiers;

3. Xerox is guilty, in violation of Section 1 of the Sherman Act, of a broad spectrum of acts and practices in unreasonably restraining trade in the technology, the manufacture and the marketing of plain paper office copiers;

4. Xerox is guilty, in violation of Section 7 of the Clayton Act, of making acquisitions of patented and unpatented technology, stock and other assets having the probable effect of substantially lessening competition in the technology, manufacture and marketing of plain paper office copiers;

5. Xerox will continue to engage in various acts and practices during the pendency of the action in violation of those antitrust laws and the unlawful effects of its prior violations will persist during the pendency of the action;

6. Those past and future acts and practices have had and will continue to have the various unlawful, anti-competitive effects as specifically alleged in numerous paragraphs of the original complaint,[1] as specifically alleged in numerous sub-paragraphs of paragraph 27 and elsewhere in the amended complaint,[2] as urged by SCM in argument below, and as also shown by Xerox's own 1972 Long Range Plan (E863-933), effects which include enabling Xerox during the pendency of the action to increase the existing technological lead and power, the existing manufacturing lead and power, and the existing marketing lead and power which it presently possesses against SCM and other competitors.

On these assumptions, we strongly adhere to the view that it is unthinkable that it can be determined as a matter of law without hearing evidence and making factual determinations that a competitor—here SCM—could not conceivably be suffering any "possible irreparable injury" during the pendency of the action as a result of the assumed violations.[3]

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[1] See ¶¶ 7(a-d), 30, 40, 41, 53, 55-59, 79, 83, 84, 93, 101, 102, 113, 123, 125, 126, 136 and 142 (A22-54).

[2] See ¶¶ 24, 26, 27(h)(iv), 27(h)(v), 27(i), 27(j), 27(t)(i), 28(b) and 28(d)-(k) (A78-85).

[3] Xerox does not dispute the principle established in this Court that on a showing of a clear likelihood of ultimate success on the merits, preliminary relief can be granted where there is "possible irreparable injury" (SCM Br. 40-41). SCM's main brief demonstrates that, absent relief during the pendency of the action, the irreparable injury to SCM is not merely "possible", but, on the showing that SCM proposes to make at a hearing, massive, pervasive and undeniable (SCM Br. 36-40).

Xerox does not respond to SCM's description of the factual and legal context of Xerox's numerous antitrust violations (SCM Br. 28-36), except to assert that SCM's discussion of *United States* v.

(footnote continued on following page)

Indeed, Xerox itself asserts on this appeal (Xerox Br. 11n), as it did below (E212; E215-25), that the "issues of violation and impact are inseparably intertwined." We agree. The very demonstration of pervasive antitrust violation by Xerox that SCM proposes to make at a hearing will also demonstrate impact and, therefore, the injurious effects on SCM, other competitors and the public.

B. Xerox's Unwarranted Claim That SCM Seeks An Advisory Opinion

In this Court, as below, Xerox repeatedly persists in making the unfounded charge that SCM's "true motivation is to obtain an 'advisory opinion' as to whether it is likely to succeed on its claims of Xerox's antitrust violations" (Xerox Br. 42-43; see also pp. 2, 5, 8, 34, 52).

It goes without saying that "an advisory opinion" is rendered when no case or controversy exists between the parties, that is, when a party is seeking an answer to an academic or hypothetical question which does not pertain to an existing controversy.[1] Here, from the outset of the action, SCM has sought preliminary injunctive relief and Xerox has taken every imaginable step in its attempt to delay and to oppose its granting. A fiercer controversy cannot be visualized.

(footnote continued from preceding page)

Aluminum Company of America, 148 F.2d 416 (2d Cir. 1945) is "simplistic" (See SCM Br. 34-35, 48; Xerox Br. 35n). Nor does Xerox respond to most of the discussion by SCM (at pp. 36-40) of the irreparable harm during the pendency of this action flowing from these violations. For example, Xerox says nothing about the injury *pendente lite* to SCM from Xerox's unlawful exclusive acquisitions of technology and products from Rank-Xerox, Battelle and others (SCM Br. 39); from Xerox's unlawful expansion of its product line (SCM Br. 35); from Xerox's strengthened position in the United States achieved through its unlawful alliance with Rank-Xerox and Fuji-Xerox (SCM Br. 38); and, to take but one more example, from the possible obsolescence of SCM's products being presently marketed or under development from the introduction of new products by Xerox using new technology (SCM Br. 38).

[1] See *e.g., Barr* v. *Mateo,* 355 U.S. 171 (1957); 1 Moore Federal Practice at p. 56, fn. 11 (1972).

C. Xerox's Disavowal of the Decision of the Court Below.

Xerox disavows the decision of the court below, and the arguments which Xerox itself made leading to that decision, when it now asserts:

> "There is all the difference in the world between a motion to dismiss for legal insufficiency under Rule 12(b)(6) and Xerox's opposition to SCM's preliminary injunction motion." (Xerox Br. 44)

Xerox makes no attempt to square these new contentions with the district court's decision of January 3, 1974 (A130) or with Pre-Trial Ruling No. 6, where the court described Xerox's objection to the legal sufficiency of SCM's motion and framed the issue raised by that objection as arising under the principles of a Rule 12(b)(6) motion (A133; see also A130):

> "In effect, defendant is demurring to plaintiff's motion, or, in the language of Fed. R. Civ. P. 12(b), raising the defense that plaintiff, in seeking a preliminary injunction, has failed to state a claim upon which relief can be granted."

Xerox now attempts to disavow the applicability of Rule 12(b)(6) principles because under such principles there is no justification for the district court's failure to consider whether any relief might conceivably be granted on SCM's claim (SCM Br. 24-26). Xerox itself, rather than deal with the legal sufficiency of most of the relief sought by SCM, makes the astonishing claim, never made before, that SCM did not "request" any of the forms of preliminary relief discussed in the briefing below other than those forms set forth in its amended complaint (Xerox Br. 23. See also Xerox Br. 4, 14, 15n, 33, 43-48).

In the first instance, it is irrelevant whether the other relief discussed in SCM's briefs was or was not requested, since the issue under Rule 12(b)(6) principles is, even assuming the wrong relief had been requested in the amended complaint, whether some other form of relief might prop-

erly be granted with respect to the alleged wrongs (SCM Br. 24).

But in any event, SCM below made it perfectly plain, and both the district court and Xerox recognized, that under SCM's prayer in general terms for other or further or alternative preliminary relief, it was specifically requesting the forms of relief discussed in its brief (E652, 667, 700-01, 705, 753-54).

At every stage in the proceedings, Xerox treated SCM's requests as just that. Thus, for example, SCM's request in its brief for access to Xerox's unpatented technology and for an injunction against Xerox's acquisition of patented or unpatented technology, stock and other assets (E487, 515) were each termed by Xerox as a "request" (E512, 515; see also E495, 514).

At the March 6 oral argument counsel for Xerox referred to the "chronology of SCM's requests" for relief and asserted to the court that there were "four segments to that chronology: the prayers in the original complaint; the additional prayer in the amended complaint; the additional prayers in SCM's opening brief on this motion; and the additional prayers in SCM's reply brief" (E621-22; see also E594, E595, E627, E630-31, E633).

Moreover, no prejudice resulted to Xerox from specifying particular forms of other or alternative relief in the briefs rather than the notice of motion, since in any event Xerox had notice prior to any evidentiary hearing. If any question had been raised below concerning any alleged insufficiency of SCM's general prayer for other or alternative relief, SCM could have served an amended notice of motion setting forth the additional requested forms of relief, but this was not necessary nor was the matter raised.[1]

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[1] Xerox now, but did not below, offers an argument based on a series of cases decided under Rule 7(b) (1) in support of its erroneous assertion that the district court could ignore the relief specified during the briefing (Xerox Br. 45). Typical of the cases

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In *Interphoto Corporation* v. *Minolta Corporation*, unreported, see E566 (S.D.N.Y. 1969), *aff'd*, 417 F.2d 621, 622 (2d Cir. 1969), additional injunctive relief *pendente lite* was requested after hearing. The court granted such relief, noting that although the relief had not been specifically requested in the moving papers and no general prayer for other relief was contained in the motion, the request for "such other and further relief" contained in plaintiff's counsel's moving affidavit was sufficient.

Xerox fails in its attempt (Xerox Br. 45n) to distinguish *Interphoto* and the other cases cited by SCM (SCM Br. 25n) that granted kinds of preliminary relief different from what the moving party requested or that granted specific relief when the moving party sought relief in general terms only. Xerox cannot and does not attempt to distinguish the decision in *Glen-Arden Commodities, Inc.* v. *Costantino*, 493 F.2d 1027 (2d Cir. 1974) (SCM Br. 25n), where the motion for preliminary relief requested only "an order . . . enjoining the defendants . . . from further violations of [specified statutes]," and specific forms of relief were granted after hearing.

There is nothing in the district court's opinion which suggests that SCM had not requested the other relief described in its briefs, or as Xerox wrongly argues (Xerox Br. 23), that the court refused to consider the legal sufficiency of such relief because of any alleged failure by SCM to request it. Thus, on the basis of an entirely fallacious portrayal of the record below, Xerox has constructed an erroneous argument for two purposes: to support the absence in its brief of any discussion of the legal

(footnote continued from preceding page)

it relies on is *Alger* v. *Hayes*, 452 F.2d 841 (8th Cir. 1972). There defendant sought review of a denial of his motion to dismiss on jurisdictional grounds. The Court on appeal was unable to determine whether a jurisdictional motion had been made, and if so, whether it had been made timely. Thus, in affirming, it referred to the Rule 7(b) (1) requirement that motions be in writing. The case plainly has no application here, where this Court has a full record ot SCM's claims before it. The other cases cited by Xerox are equally inapposite.

sufficiency of these forms of relief, and to divert attention from the error of the court below in failing to follow Rule 12(b) (6) principles by failing to consider the legal sufficiency of other forms of relief, even if the wrong relief had been requested in the amended complaint, before denying the motion as a matter of law.

A second way in which Xerox disavows the decision below, equally without foundation in the record, is with the oft-repeated claim that SCM "refused" to make a showing on irreparable injury by affidavits as directed by the court (Xerox Br. 2, 4, 17, 18, 19, 20, 50, 51).

The court below made no suggestion in its opinion that it had directed or requested or that SCM had refused to furnish affidavits concerning irreparable injury. The absence of affidavits played no part in the decision below. Indeed, no manner of showing by affidavit would satisfy the district court, since it held that SCM's motion was insufficient as a matter of law.

If the absence of affidavits had played any part in the decision below denying the motion, the court would have required affidavits in its order, or, at most, denied the motion without prejudice.

Moreover, the court below never asked for affidavits; rather, in the give and take of oral argument, it merely raised the question of whether there was any need for affidavits. SCM in response to these inquiries never once refused a request by the district court, but instead only stated its position that affidavits were unnecessary and would produce further delay.

To take one example from the record, Xerox on page 19 of its brief quotes virtually two full paragraphs of remarks by the court appearing at E677-78. The court there never requested affidavits, but rather stated that it was "wondering" whether "perhaps" SCM might have the burden of making a "presentation by affidavit. . . ."

Counsel for SCM responded to this and other such inquiries with a statement of SCM's position that affidavits have no place on a demurrer; that they are in any event

unnecessary in light of the showing of irreparable injury made in the evidence submitted by SCM, including Xerox's 1972 Long Range Plan; that the issue concerning irreparable injury was a factual one requiring evidentiary hearing; and that affidavits concerning that issue would only produce further unnecessary delay (E677-95; E730).

Moreover, Xerox prior to the oral argument of March 6 failed to suggest any procedure involving affidavits. SCM's first motion for a preliminary injunction was served with the complaint on July 31, 1973 (SCM Br. 5-6). It was a subject of discussion at an untranscribed chambers conference on September 12, 1973, when counsel for Xerox first expressed its objection to SCM's motion. Xerox then said the motion was legally insufficient because the relief sought would alter the *status quo,* but it said not one word about SCM's suggested approach dispensing with affidavits.

SCM's renewal of its motion for a preliminary injunction and its submission of documentary evidence were made on November 16, 1973 (SCM Br. 9-14). Xerox in its brief of December 4, 1973 (E201) and at oral argument on December 7, 1973 (E251) again said nothing about affidavits and only requested that the court set a schedule "for the briefing of the legal question of whether the preliminary relief sought by SCM can in any event be granted . . ." (E248; see also E205).

In response, the court directed the parties "to submit briefs as to whether Xerox is entitled to have SCM's motion for a preliminary injunction denied as a matter of law" (A130). The court went on tentatively to set May 1, 1974 as the target date for a hearing on SCM's motion provided that SCM could overcome the hurdle of Xerox's asserted legal defense (A130-31).

Xerox both in its main brief of February 4 (E369) and its reply brief of February 15 (E495) never questioned the procedure, and never stated that affidavits should be required.

During oral argument on the motion on March 6, Xerox for the first time complained about the procedure and stated that SCM should submit affidavits, although

only as to irreparable injury (E715). Suddenly, seven months after the motion had been made, and after the court had set a tentative target date for the hearing, Xerox would interpose yet another hurdle and further delay between SCM and that hearing.

Moreover, a further factual showing of SCM's irreparable injury is unnecessary in light of the substantial—and wholly unrebutted—factual showing already made by SCM with extensive documentary evidence. This evidence, particularly Xerox's 1972 Long Range Plan, shows the irreparable injurious effects during the pendency of the action on SCM and other competitors resulting from Xerox's alleged violations. (See SCM Br. 11-14, 29-40.)

Xerox's sole reference on this appeal to the documentary evidence submitted below is its assertion that it relates to "alleged wrongdoing" rather than injury (Xerox Br. 4n). But a review of such evidence (SCM Br. 11-14; E777-968) shows that it portrays both wrongdoing and the unlawful effects of wrongdoing on SCM and other competitors immediately and during the coming decade. And, as we have noted above at p. 4, Xerox itself correctly asserts that "violation and impact are inseparably intertwined" (Xerox Br. 11n). Thus, any affidavits and other evidence concerning irreparable injury would necessarily require extensive treatment of Xerox's violations, including their impact, the preparation of which by both sides would only further delay the evidentiary hearing that would in any event be required (see Xerox Br. 16n, 17-18, 51n).[1]

In sum, Xerox's arguments on this appeal about affidavits; its arguments (pp. 5-8 above) that the forms of relief other than those requested in the amended complaint should be ignored; and its claim that there is

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[1] Moreover, Xerox's repeated contention that SCM's motion rested only on "conclusory" allegations (*e.g.*, Xerox Br. 2, 4) also ignores the highly specific allegations of injury in the pleadings. See fns. 1 and 2, p. 3, *supra*. The original complaint was even more detailed than the amended complaint in this regard, but, ironically, Xerox sought its dismissal because it was too particularized (E3). Even now Xerox says the original complaint contains "a mountain of evidence" (Xerox Br. 9).

"all the difference in the world" between its demurrer here and a Rule 12(b)(6) motion; are all reflections of Xerox's effort on this appeal to mis-characterize the nature of the proceedings below.

But since the court below framed and purported to decide the issue here under Rule 12(b)(6) principles, the questions on this appeal are whether there is any possible threatened immediate irreparable injury to SCM resulting from Xerox's alleged violations and whether there is any preliminary relief that conceivably may be granted after evidentiary hearing to ameliorate this injury during the pendency of the action. Thus, as argued in SCM's main brief, the court below erred when it refused fully to address these questions and instead considered only the particular forms of relief described in paragraphs 49-53 of the amended complaint (SCM Br. 24-26).

D. The Relief Sought by SCM and Ignored by Xerox.

There is, of course, an explanation for Xerox's attempt to mischaracterize the nature of the proceedings below. Having already accomplished substantial delay as a result of the briefing on legal issues, it now finds that it has no real answer to SCM's showing concerning appropriate relief. Xerox entirely ignores:

1. SCM's request that Xerox be enjoined during the pendency of the action from exercising its voting control over Rank-Xerox (SCM Br. 16-17, 44), and the related irreparable injury (SCM Br. 38-39). As SCM showed in its main brief (p. 44), Xerox conceded below the traditional propriety of preliminary injunctions prohibiting the use of already acquired stock when the acquisition is challenged under Section 7. It is thus not surprising that Xerox can find nothing to say about this relief here.

2. SCM's request that Xerox be enjoined during the pendency of the action from further acquisitions of technology, of products developed by others, or of the stock of companies possessing any technology, to avoid the foreclosure of access by SCM and other competitors to the technology or products involved (SCM Br. 16, 39, 45-46).

3. All of the forms of relief, in fact, described at pages 16-17, 45-46 and 45n of SCM's main brief, and the related irreparable injury described at pp. 36-40.

Xerox maintains that all of these forms of relief were "afterthoughts." If Xerox were correct, its afterthought argument might be pertinent at a hearing as going to the weight to be given to SCM's evidence. This argument, however, has no place in a brief supposedly addressed to the issue of legal sufficiency. Certainly Xerox cannot argue that SCM as a matter of law was foreclosed from amending its motion.

But Xerox is not correct that these are afterthoughts. For example, Xerox labels SCM's request for access to its short and long range plans "SCM's first afterthought" (Xerox Br. 10). But at the time the original complaint was served, together with its specification of some preliminary relief and the general prayer for other or further or alternative relief, no one at SCM had seen Xerox's short and long range plans. Shortly before service of the amended complaint, Xerox's 1972 Long Range Plan and other documents were produced at the outset of discovery proceedings. A reading of these plans by SCM's counsel (and not SCM's business people under the confidentiality order below) showed to counsel that they set forth Xerox's objectives for the forthcoming decade and the means by which Xerox intended to accomplish these objectives. It was only then that SCM's counsel understood the urgent need for their prompt disclosure to SCM in light of SCM's ongoing efforts to develop a plain paper office copier for introduction in 1975. (See also the discussion concerning disclosure of these plans at pp. 19-21 below.)

This is hardly an afterthought. Rather, as with all the so-called "afterthoughts," it was the consequence of the growing understanding, achieved through the discovery process, of the relief required to ameliorate the injury SCM will suffer immediately and during the pendency of the action as a result of the unlawful effects of Xerox's violations and its threatened violations.

E. The Relief Sought by SCM That Xerox Does Discuss.

A fatal weakness which cuts across all of Xerox's arguments directed to each form of relief which it discusses is that each such argument involves disputed factual matters, and thus can only be considered at the evidentiary hearing that SCM seeks. SCM has established (SCM Br. 41-43) that the district court improperly made findings of fact in several respects. It was plain error to make these factual findings without a full record as required under the principles of *Securities and Exchange Commission* v. *Spectrum, Ltd.*, 489 F.2d 535, 540-541 (2d Cir. 1973) and other authorities which Xerox concedes require an evidentiary hearing as to genuine issues of fact raised on a motion for a preliminary injunction (Xerox Br. 51, n57).

Patents. Here Xerox relies most heavily on its representations made to the district court in its post-argument letter of March 8 (E759) as negating SCM's showing of irreparable injury. Of course, Xerox is not an eleemosynary institution; its very willingness to offer SCM token relief represents its awareness of SCM's irreparable injury.

Xerox's offer of a patent license should be viewed in the context of its licensing policy. For almost 15 years and up until the present time, Xerox has unlawfully refused all requests, including those repeatedly made by SCM, for patent licenses enabling the licensees to engage meaningfully in plain paper office copying.[1] In 1970, shortly after the Federal Trade Commission announced the commencement of its investigation of Xerox, Xerox offered a "standard" license agreement respecting only three of its patents. The offer as an economic matter was illusory

[1] It is conceded at this juncture that Xerox's refusals to license are unlawful since (a) the vital technology involved was acquired by Xerox from Battelle and others in violation of each of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act, and (b) by no later than 1963, and since that time, Xerox had acquired and has maintained an unlawful monopoly of the relevant patented and unpatented technology (SCM Br. 28-30; A25-28; A76-79).

and would not have permitted anyone to manufacture plain paper office copiers because (a) the technology covered by the three patents was old, with all the patents based on applications filed in the period 1948 to 1953, (b) a great deal of additional technology would be required to develop a competitive machine; (c) a licensee would still be subject to Xerox's patent thicket and the threat of patent litigation, and (d) the required royalty was exorbitant at 12% of sales per patent regarding copiers as fast as most of Xerox's. Not surprisingly, despite the many companies interested in making entry into plain paper office copying, not one accepted Xerox's license offer. See ¶¶ 103-115 of the original complaint (A45-48) and ¶¶ 27(m)-27(o) of the amended complaint (A82).

In 1973, shortly after the FTC commenced its proceeding, Xerox made a second "standard" license offer. The offer was to license the same three patents, now three years older, and a fourth patent concerning toner that was based on an application filed 20 years before. Although the royalty rate was somewhat reduced, the offer had all the same deficiencies as the 1970 offer. Thus, it is still true that there are no plain paper office copiers being marketed anywhere pursuant to such a patent license from Xerox.[1] See ¶¶ 116-120 of the original complaint (A48-49) and ¶ 27(o) of the amended complaint (A82).

The patent license offer made below in Xerox's post-argument letter is little more than a third illusion. The offer was confined to the copier SCM then had under development and to the copier SCM then was marketing, and thus did not meet SCM's request in paragraph 51 of the amended complaint for an unrestricted patent license (A92). Thus, while Xerox continues to make technological progress and develop machines based on new technology, it would leave SCM frozen, without the latitude to attempt development of different copiers using current technology or to attempt development of a full line.

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[1] Although not part of the record here, we have learned in discovery that one company has, however, made such a license agreement with Xerox.

Xerox's offer is not meaningful in terms of offering SCM the possibility of competing on a technological par with Xerox. Xerox in its 1972 Long Range Plan states that it intends to maintain its "technical supremacy" (E893), while, regarding everyone else, it states (E907):

> "No major new competitive technology or product surprises during 1972-1981 are anticipated."

Plainly, Xerox when under pressure (in 1970 from the FTC's investigation, in 1973 from the FTC's proceedings, and now from the threat of a hearing on the merits) has sought to give the appearance of beginning a licensing policy. But by limiting offers to old technology it has ensured that its technical supremacy remains unchallenged. Xerox now proposes to permit SCM to market copiers based on old technology, while reserving to itself the opportunities to use and develop major new technology and to market "product surprises," which may obsolete the products of others. Xerox should not through its restrictive license offer be permitted to accomplish this unlawful result.

Secondly, the requirement of a 4% "non-refundable" royalty (E760) is unreasonable when SCM contends and would show at a hearing that Xerox has no right to extract any tribute whatsoever for its illegally acquired and misused patents. Xerox has conceded that if SCM's claims are ultimately sustained, SCM is entitled to equitable relief rendering Xerox's patents unenforceable (E383). Thus, assuming at this juncture an evidentiary showing of the clear likelihood that Xerox's patents are unenforceable, SCM is entitled to a judicial determination on its claim in paragraph 51 of the amended complaint (A92) that any royalty determination be deferred until final adjudication of SCM's First Claim. Failing that, it is entitled to a judicial determination on evidence—not Xerox's unilateral determination[1]—concerning the amount of a reasonable royalty during the pendency of the action which, instead of

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[1] Xerox in this regard fails to distinguish *United States* v. *Columbia Steel Co.*, 71 F.Supp. 734 (D.Del. 1947), and the sound reasoning underlying it (See SCM Br. 42).

being "non-refundable," would be recoverable from Xerox in the event of SCM's ultimate success in showing the unenforceability of Xerox's patents.

Also, as Xerox knows, the cost to SCM of the copier it purchases from Van Dyk is substantially greater than the cost to Xerox of its most nearly comparable model. In these circumstances, the payment by SCM of 4% of its gross sales to Xerox is unreasonably high, and would add another competitive disadvantage at a time when SCM is already severely handicapped by Xerox's past and threatened violations.

Finally, as even the court below recognized (A138), the license offer was not sufficient to give SCM protection abroad.[1] This is most significant because presently fully one-half of SCM's revenues in coated paper office copying are from marketing activities carried on by its international sales and service organization outside the United States (See E639; E699).

Xerox's undertaking not to seek a preliminary injunction in any patent litigation it may commence against SCM or its suppliers adds nothing since such preliminary relief would not have been available in any event (see SCM Br. 19). Further, litigation like that commenced by Xerox against IBM, now pending for four years, with millions of dollars expended and no preliminary injunction by Xerox having been sought, in itself has serious anticompetitive effects, as noted by the Supreme Court.[2]

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[1] Xerox's license offer with respect to countries in which Rank-Xerox has pertinent rights was made, in Xerox's words, "to the extent that Xerox has the legal authority to accomplish them." Xerox, of course, possesses voting control of Rank-Xerox and exercises that control to operate Rank-Xerox as though it were an internal division of Xerox (SCM Br. 12-13, 33-34). If there is any question about Xerox's legal authority over Rank-Xerox, then this too should be a subject for inquiry at the preliminary injunction hearing. A court order would with precision direct what is required of Xerox after determining what legal authority it has rather than leaving the question unresolved as it is now.

[2] *Blonder-Tongue* v. *University of Illinois Foundation,* 402 U.S. 313, 339-47 (1971). Xerox in its brief (38 n.) completely distorts the expression by SCM's counsel at oral argument of SCM's position concerning the expense of patent litigation (See E641-47; E684-86).

It is conceded for purposes here that Xerox has engaged in patent litigation with new competitors as part of an unlawful exercise of monopoly power in order to raise higher the barriers to entry (SCM Br. 34, 38-39); and SCM can reasonably anticipate that it will be met with such burdensome and protracted patent litigation by Xerox (A45). Thus, Xerox should not be permitted to wield this club during the pendency of the action. See *Philadelphia World Hockey Club, Inc.* v. *Philadelphia Hockey Club, Inc.*, 351 F.Supp. 457 (E.D. Pa. 1972); E595-600; SCM Br. 49-50.

Xerox's next argument concerning both SCM's request for a patent license and SCM's request for an injunction against patent infringement litigation is that such relief would improperly change what Xerox views to be the *status quo.* But it is the institution of such litigation that would change the *status quo* during the pendency of the action to the injury of SCM. Restraining Xerox from commencing such litigation, as with most of the relief SCM seeks, preserves the *status quo* no matter how viewed. See E595-600.

Moreover, SCM's main brief demonstrated that preservation of the *status quo* is but one factor to be considered in the weighing and balancing processes required on a preliminary injunction motion. As Judge Waterman wrote for a unanimous *in banc* panel of this Court:

> "A motion for a preliminary injunction invariably raises an issue as to '* * * how best to create or preserve a state of affairs such that [the court] will be able, upon conclusion of the full trial, to render a meaningful decision for either party.' Developments in the Law—Injunctions, 78 Harv. L.Rev. 994, 1056 (1965)."

Chappell & Co., Inc. v. *Frankel,* 367 F.2d 197, 202 (1966).

Nothing in Xerox's brief dispels this notion. Rather, Xerox's attempts to distinguish the cases cited by SCM demonstrate the correctness of SCM's position. For example, in discussing *Interphoto Corp.* v. *Minolta Corp.*, unreported, see E566 (S.D.N.Y. 1969), *aff'd,* 417 F.2d 621 (2d Cir. 1969), Xerox explains a preliminary order direct-

ing Minolta to ship goods to the plaintiff in places where it had never previously shipped to the plaintiff by stating that the injunction "did not afford plaintiff a new status" since "the plaintiff at all times had a legal right to be free from such unlawful restraints" (Xerox Br. 27-28n). Here too, respecting patents and respecting the other relief SCM seeks, SCM wants no more than to be free of Xerox's unlawful restraints during the pendency of the action.

Employee Covenants. Xerox attempts to moot this issue by representing that one of the forms in question, containing the direct prohibition against engaging in xerography and in continuous use since 1960, has been abandoned.[1] Although Xerox finds it "astonishing" (Xerox Br. 33) that SCM does not accept this representation, the simple fact is that Xerox in its interrogatory answers stated that the form of agreement has been in effect from "mid 1966 to present" (E757). Xerox has never attempted either below or in its brief here to explain this evidence. Thus, at best, there is now an issue of fact requiring hearing concerning whether Xerox uses such agreements. Further, Xerox has made no claim that it has abandoned the other form of agreement with which it restrains the access of others to qualified personnel who terminate employment with Xerox.[2]

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[1] "Mere voluntary cessation of allegedly illegal conduct does not moot a case." *United States* v. *Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968).

[2] This second form of agreement (E771) restrains Xerox employees from working for others by obligating them not to disclose Xerox's secrets or proprietary information, since in Xerox's view virtually everything is secret. For example, in its words, anything "which might cause embarrassment to the company . . ." is secret (record on appeal in *Xerox Corporation* v. *Neises*, 31 App. Div. 2d 195 (N.Y. Appellate Division, 1st Dep't 1968)), and, as the court below noted, Xerox "would make even Pentagon classifiers blush" (E362). These agreements thus make it difficult or impossible for one to leave Xerox without changing fields, and thus difficult or impossible for SCM and other actual and potential competitors to obtain the services of qualified persons.

In addittion to being one of Xerox's tools for monopolization, such agreements also fall within the scope of § 1 of the Sherman

(footnote continued on following page)

Short and Long Range Plans. Ignoring the discussion at pp. 48-49 of SCM's brief, Xerox says that SCM's claim of irreparable injury from the lack of access to these plans is "ephemeral" (Xerox Br. 34). But the existence of the very type of irreparable injury discussed by SCM in its brief is reflected in a recent consent judgment approved by the court in *Bell & Howell* v. *Eastman Kodak Company,* 73 C 35 (N.D. Ill. July 8, 1974). Under that judgment, Kodak is required to engage in a "disclosure program" advising Bell & Howell of its intent to introduce certain new products at least 18 months prior to their introduction, and then at specified times to give Bell & Howell precise information concerning the products to be introduced. The judgment thus recognizes that disclosure of plans ordinarily kept secret can be necessary to avoid the harm that would otherwise be inflicted upon one attempting to compete with the dominant company in an industry.

To support its contention that SCM does not need this and various other forms of relief, Xerox points to the existence of a small group of companies presently marketing plain paper office copiers as though this were conclusive proof that Xerox can be successfully met in the marketplace without access to its planning documents. But the mere existence of a handful of recent competitors does not prove that any of them are effective competitors.

Xerox says nothing about the effectiveness of any of these competitors and thereby ignores its prior statements in its internal documents and to the public that its com-

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Act and are subject to the "rule of reason." *United States* v. *Addyston Pipe & Steel Co.,* 85 Fed. 271, 281 (6th Cir. 1898), *aff'd,* 175 U.S. 211 (1899); *Bradford* v. *The New York Times Co.,* 1974 Trade Cas. ¶ 75,149 (2d Cir. 1974); Blake, Employee Agreements. Not to Compete, 73 Harv. L. Rev. 625, 628 n.8 (1960); Goldschmidt, Anti-Trust's Neglected Step-Child; A Proposal for Dealing With Restrictive Covenants Under Federal Law, 73 Colum L. Rev. 1193 (1973). See also *United Shoe Machinery Co.* v. *LaChappelle,* 212 Mass. 467 (1912), cited with approval in *Transparent-Wrap Machine Corp.* v. *Stokes & Smith Co.,* 329 U.S. 637, 647 (1947).

petitors are insignificant (E836, E896, E903). The one exception, according to Xerox, is IBM, offering "minimal" competition, but IBM, says Xerox, wrongfully misappropriated Xerox's secret technology.[1] *Xerox Corp.* v. *IBM,* 70 Civ. 1596 and 73 Civ. 3421 (S.D.N.Y.).

The issue is not the existence of a few fledgling competitors, but rather whether equitable relief is required during the pendency of the action to restrain likely antitrust violations and thereby better promote effective competition.

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[1] The simple fact is that today, after four years of attempts by others, particularly IBM, to market in competition with Xerox and almost 15 years after the first plain paper office copier came to market, Xerox still enjoys over 95% of the enormously expanding domestic revenues from the marketing of plain paper office copiers (A75).

Xerox quarrels with SCM's definition of the market (Xerox Br. 12n) in order to avoid the inference of monopoly power that follows from its 95% share. Xerox misplaces reliance on SCM's petition for certiorari in *Advance Business Systems & Supply Co.* v. *SCM Corp.,* 415 F.2d 55 (4th Cir. 1969), *cert. denied,* 397 U.S. 920 (1970). The Fourth Circuit there had held, consistent with SCM's position here, that coated paper office copiers were a relevant submarket (415 F.2d at 69). The existence of a broader office copying market, including both plain and coated paper office copiers, as argued by SCM in its unsuccessful petition for certiorari, is compatible with a relevant submarket that includes plain paper office copiers alone. See *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 325 (1962), where the Court held that:

> "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for anti-trust purposes." (footnote omitted)

This reasoning was relied on and further explicated by the Court in *United States* v. *Alcoa* (*Rome Cable*), 377 U.S. 271, 275 (1964) (copper conductor sub-market distinct from aluminum conductor submarket), and has been applied consistently ever since, most recently in *United States* v. *Marine Bancorporation,* 42 U.S.L.W. 5210, 5215-16 (U.S. Sup. Ct., June 26, 1974); and *United States* v. *Connecticut National Bank,* 42 U.S.L.W. 5226, 5227-29 (U.S. Sup. Ct., June 26, 1974) (commercial banking sub-market distinct from savings banking submarket despite "fierce" competititon between them at various points).

The existence of minimal competition is not inconsistent with the need for preliminary equitable relief to create the possibility of effective competition. Equitable relief was needed to lessen the monopoly power of United Shoe, even though it had "at least 10 other American and some foreign" competitors. (*United States* v. *United Shoe Machinery Corp.*, 110 F.Supp. 295, 339 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954). See also *United States* v. *Grinnell Corp.*, 384 U.S. 563, 572n (1966) (38 competitors).

The point was succinctly made by Judge Higginbotham in *Philadelphia World Hockey Club, Inc.* v. *Philadelphia Hockey Club, Inc.*, 351 F.Supp. 457, 510 (E.D. Pa., 1972), where he stated:

> "The operation of the antitrust laws need not be delayed until one is trying to resurrect the dead; these laws are designed to conserve living competitors."

The parties' opposing contentions here—SCM's that effective competition does not exist; Xerox's that the presence of competitors shows that relief is not needed—can only be resolved on an evidentiary hearing.

Unpatented Technology. Xerox here makes a factual argument, completely unrelated to legal sufficiency, that Xerox's unpatented technology is not needed by SCM during the pendency of the action "to compete effectively" (Xerox Br. 46). That Xerox is wrong on the facts is established by its own statement (E896; SCM Br. 37), concerning the critical importance of the unpatented "knowhow" which it controls.

F. The Inadequacy of Money Damages.

As to all the forms of preliminary relief sought by SCM, Xerox contends that none is available because any harm that SCM may suffer is compensable with money damages. Xerox relies on *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946) and similar cases. But all *Bigelow* holds is that the jury may consider a reasonable estimate of damages; it hardly insures that the jury

will adopt that estimate or that it will be adequate in light of the uncertainty surrounding questions of damages.[1]

In making its argument, Xerox cannot and does not attempt to avoid the force of this Court's square holding stated by Judge Mulligan in *Danielson* v. *Local 275,* 479 F.2d 1033, 1037 (2d Cir. 1973), that uncertainty in the measure of damages renders money damages inadequate and therefore any harm in question is "irreparable."[2] *Bigelow* and its progeny say nothing that is contrary.

As SCM's counsel argued below, projecting what SCM would demonstrate at a hearing (E690):

> "SCM is an organization of people, it's not inanimate. These are people who want to engage in the business process, they want to engage in the competitive process, and they want to do it having access to those essential ingredients that are required. . . . They are not in the business of bringing lawsuits for the sake of getting money at the end of a long time. . . ."

In *Semmes Motors, Inc.* v. *Ford Motor Company,* 429 F.2d 1197 (2d Cir. 1970), where the Semmes obtained a preliminary injunction against the termination of their Ford dealership, Chief Judge Friendly put the matter in much the same terms:

> "Of course, Semmes' past profits would afford a basis for calculating damages for wrongful termination, and no one doubts Ford's ability to respond.

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[1] Xerox's reliance on *Columbia Pictures Industries, Inc.* v. *American Broadcasting Companies, Inc.*, 1974 Trade Cas. ¶ 75,147 (2d Cir., 1974) is also misplaced, since plaintiffs there did not show clear likelihood of success on the merits, and since the Court found, on the special facts there involved, that plaintiffs had failed to show any "great" harm (*id.* at p. 97,138), much less irreparable harm.

[2] Other cases holding harm to be irreparable because of the difficulties of computing monetary damages include *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952); *Bergen Drug Co.* v. *Parke Davis & Co.,* 307 F. 2d 725 (3d Cir. 1962); *McKesson & Robbins* v. *Charles Pfizer & Co., Inc.,* 235 F.Supp. 743 (E.D. Pa. 1964); and *Swartz* v. *Chrysler Motors Corporation,* 297 F.Supp. 834 (D.N.J. 1969).

But the right to continue a business in which William Semmes had engaged for twenty years and into which his son had recently entered is not measurable entirely in monetary terms; the Semmes want to sell automobiles, not to live on the income from a damages award. See *Madsen* v. *Chrysler Corp.*, 261 F.Supp. 488, 507 (N.D. Ill. 1966), vacated as moot, 375 F.2d 773 (7th Cir. 1967).'"[1]

G. The Importance of the Public Interest and SCM's Role as a Private Attorney General.

Xerox's brief says little about prospective injury to the public or the public interest in having the benefits of competition in the ensuing years. The lion's share of the burdens resulting from Xerox's anti-competitive acts and practices falls on the public's shoulders and the public, of course, has no remedy for delay in the implementation of equitable relief.

The extent to which the interest of the public must be considered cannot be determined until after a hearing. As Judge Friendly has noted, the public interest favoring the granting of preliminary relief is "a direct function of the strength of the plaintiff's antitrust . . . claims."[2]

Xerox disingenuously suggests that the pendency of the Federal Trade Commission action against it undermines SCM's role in this action as a private attorney general.[3]

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[1] There are numerous examples of cases where damages are more readily calculable than here, where preliminary relief is nevertheless granted. One example is relief against the termination of a dealership, where past history provides a good basis for estimating the damages. SCM lacks even this past history since this case involves its exclusion from plain paper office copying to begin with. See *Bateman* v. *Ford Motor Company*, 302 F.2d 63 (3rd Cir. 1962); *Engines Specialities* v. *Bombardier Ltd.*, 454 F.2d 527, 531 (1st Cir. 1972).

[2] *Missouri Portland Cement Co.* v. *Cargill, Inc.*, 1974 Trade Cas. ¶ 75,113 at p. 96,959 n.35 (2d, Cir. 1974), citing *Gulf & Western Industries, Inc.* v. *Great Atl. & Pac. Tea Co.*, 476 F.2d 687, 698-99 (2d Cir. 1973).

[3] Xerox misplaces reliance on *Columbia Pictures Industries, Inc.* v. *American Broadcasting Cmpany, Inc.*, 1974 Trade Cas. ¶ 75,147

(footnote continued on following page)

But Xerox fails to mention that the Federal Trade Commission lacks any power to seek preliminary injunctive relief, since its suit against Xerox was commenced prior to the recent legislation (Public Law 93-153) which first gave the Commission power to seek such relief but only in subsequently commenced proceedings.

Xerox fails to mention that in the Commission proceedings it raises as an affirmative defense that the Commission does not have the jurisdiction to determine whether it has monopolized plain paper office copying. (First affirmative defense in Answer, February 20, 1973, *Matter of Xerox Corp.*, FTC Dkt. No. 8909.) Thus, if Xerox has its way neither SCM nor the Commission will be allowed to attempt to vindicate the public interest.

Further, Xerox has recently described the Commission proceedings against it as follows (Xerox's Application for Review, June 14, 1974, *Matter of Xerox Corp., supra*):

> "The issues to be adjudicated in this proceeding cover the entire waterfront of a massive industry. The complexity and the dimension of the facts are mind-boggling. . . . If not the largest case instituted by the Commission against a single respondent, this surely ranks near the very top."

The possibility of any injunctive relief being imposed against Xerox after such "mind-boggling" proceedings is at least a full decade away, considering pre-trial discovery

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(2nd Cir. 1974), in this regard. There, plaintiffs did not establish clear likelihood of success and, in a very different factual context, the public's interest was expressly held "not coextensive" with the appellants' own interests (*Id.* at pp. 97,135-141).

Xerox also purports to rely on *Columbia Pictures* as to SCM's alleged delay in seeking relief. The issue of alleged delay and any alleged prejudice to the defendant is at best a factual matter to be considered in the balancing of the equities after evidentiary hearing. As to these matters, including SCM's pursuit of legal relief against Xerox and its continuing but unsuccessful efforts to gain entry into plain paper office copying, see SCM Br. 51-52, 36-37.

proceedings, trial and post-trial proceedings before the administrative law judge; appeal to the full Commission; appeal to a court of appeals; and review by the Supreme Court.

Xerox would have relief in this case brought by SCM delayed just as long, for Xerox thinks this case too "boggles the mind" and requires discovery "of huge proportions" (E332, E337). In all those circumstances there is an urgent need that SCM be accorded the fullest measure of its role as a private attorney general, particularly at this time with respect to its motion for preliminary injunction.

In the end, the result of the decision below is to postpone to the indefinite future the determination of any of SCM's claims on the merits. In doing that, and before that, in refusing severance because of Xerox's jury trial demand,[1] the court below has both improperly impaired SCM's right to prompt judicial consideration of its equitable claims and improperly left SCM and the public to bear the burdens of Xerox's anticompetitive acts and practices during the years to come.

SCM in the past has expended great time, effort and money in attempting to establish a foothold in plain paper office copying and in becoming a competitor of Xerox's at every level of that business activity. Its position as a fledgling plain paper office copier competitor is tenuous. (Prior to its Van Dyk contract, SCM's annual revenues from its coated paper office copying activities were about $80 million, producing about $3 million in losses, as compared

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[1] Any right Xerox has to try this case to a jury is fully compatible with SCM's right to expeditious consideration of its equitable claims (E165-69). Further, Xerox's attempt to dispel the notion that its jury demand was a tactic to defeat SCM's request for severance (SCM Br. 9; Xerox Br. 10-11n) ignores the facts that there is no jury demand respecting the antitrust counterclaim in *Xerox Corporation* v. *Dennison Mfg. Co.*, (67 Civ. 3302, S.D.N.Y.), or in Xerox's two patent suits against IBM (70 Civ. 1596 and 73 Civ. 3421, S.D.N.Y.), where IBM's patent misuse defenses involve claims that Xerox is not entitled to enforce its patents for many reasons like those alleged here. Further, if Xerox had made a well considered distinction between patent and antitrust cases for jury demand purposes, as it suggests, it would not have demanded a jury here on its patent counterclaims (A113).

with Xerox's revenues of nearly $2 billion, producing annual profits of more than $550 million. See E643, A75-76.) SCM intends to prove at a hearing that its ability to incur losses and invest capital in the hope of becoming an effective competitor is not inexhaustible and that it has urgent need for preliminary injunctive relief.

If SCM is forced out of the plain paper office copier business during the pendency of the action, or if SCM is restrained during the pendency of the action in its attempt to compete, or if SCM is left at the end of the action so seriously disadvantaged that it cannot readily enjoy the benefits of final relief, then the damage to SCM and to the public can never be repaired. All that SCM seeks here on this appeal is the opportunity to proceed to an evidentiary hearing to prove the truth or likely truth of its claims against Xerox and its entitlement to injunctive relief against Xerox during the pendency of the action.

CONCLUSION

The order below should be vacated, and the matter should be remanded to the district court with instructions for a prompt evidentiary hearing on SCM's preliminary injunction motion.

Respectfully submitted,

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August 19, 1974

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SCM CORPORATION,

Plaintiff-Appellant,

-against-

XEROX CORPORATION,

Defendant-Appellee.

State of New York,
County of New York,
City of New York—ss.:

Robert S. Marin, being duly sworn, deposes and says that he is over the age of 18 years. That on the 19th day of August, 1974, he served fifteen copies of Appellant's Reply Brief on Kaye, Scholer, Fierman, Hays & Handler the attorneys for Defendant-Appellee by causing same to be delivered to and left ~~by delivering to and leaving same~~ with a proper person in charge of their office at 425 Park Avenue, New York, N.Y. 10022 in the Borough of Manhattan, City of New York, between the usual business hours of said day.

Robert S. Marin

Sworn to before me this

19th day of August, 1974.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976